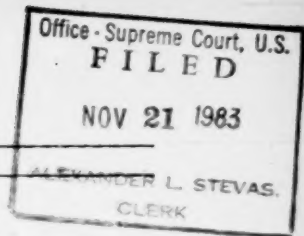


83-836

No.



IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1983

JOHN R. GLASSEY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United
States Court of Appeals
for the Seventh Circuit

PETITION FOR CERTIORARI - CRIMINAL CASE

CHARLES R. THOMAS, P.C.
417 Court Street
Pekin, IL 61554
Telephone: (309) 347-4194

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I

Was a fair trial afforded to defendant pursuant to Constitutional requirements when the court appointed counsel did not represent defendant competently; when there were business records accepted into the record without proper foundation; when there were improper statements made by the prosecution; and when there was undue prejudicial effects because the sole rebuttal witness, being a character witness who was confined to a wheelchair, was improperly questioned?

II

Did the District Court properly sentence defendant to consecutive terms when only one set of facts actually existed to constitute a crime and imposition of a sentence?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is officially reported at 715 F.2d 352 (1981), and annexed as Appendix A. (infra, p. 25) The order entered by the Seventh Circuit denying the Petition for Rehearing is annexed in Appendix B. (infra p. 29) The opinion of the United States District Court for the Central District of Illinois (Appendix C, infra, p. 33) was not reported.

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment of the Court below (Appendix A, infra p. 25) was entered on August 25, 1983. A timely Petition for Rehearing was sought but denied on October 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1) and Rule 17(a) and (c) of the Rules of this Court.

STATUTORY AND CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES

U.S. CONSTITUTION Amend. V states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION Amend. VI states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTES INVOLVED

Title 18 Section 1014 cited in full
in Appendix D.

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated below:

A. COURSE OF PROCEEDINGS AND EXISTENCE OF JURISDICTION

On October 13, 1982, in a cause pending in the United States District Court for the Central District of Illinois, Peoria Division, entitled The United States of America v. John R. Glassey, Criminal No. 81-10008, petitioner was found guilty by a jury on all ten counts for an indictment charging violations of 18 U.S.C. §1014 which creates a crime for making false statements to a federally insured banking institution. (App. A) The Court immediately entered judgment. (App. A)

On December 3, 1982, the District Court denied a Motion for New Trial and then sentenced petitioner to two years

imprisonment on Counts I and II to run consecutively. Two year sentences on Counts III through IX were imposed to run concurrently with that of Count I. The Defendant was placed on probation for three years on Count X.

This judgment and sentence was affirmed by the Court of Appeals for the Seventh Circuit, United States of America v. John R. Glassey, No. 82-2998, 715 F.2d 352 (1983). A Petition for Rehearing was denied October 14, 1983. (App. B) A Motion for Stay of Mandate pending Petition for Certiorari was granted October 26, 1983. (App. B)

B. RELEVANT FACTS CONCERNING THE UNDERLYING CONVICTION AND TRIAL ERRORS DURING PETITIONER'S TRIAL FOR MAKING FALSE STATEMENTS TO A FINANCIAL INSTITUTION WHICH WAS INSURED BY THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION.

Prior to the date of the indictments, petitioner had been secretary and part owner of Colossus, Inc., which had been engaged in the business of general contracting since 1971 and had over 15 homes under construction. (Tr. 169) In May of 1981 the Peoples Savings and Loan of Chillicothe (Illinois), the lending institution, sent a representative, who was also a social friend of petitioner's, to have petitioner sign lien waivers and subcontractors affidavits which indicated that petitioner had paid the subcontractors. All monies had been paid out on all the loans in question. The whole transaction took a few minutes. Petitioner maintained that he signed the statements only because the representative who brought the lien waivers out was a good friend and he wanted to be helpful.

At trial, the prosecutor testified to the jury in opening statements by stating, "I will explain a little bit to you of what I learned" (Tr. 10) and as to the incriminating evidence against petitioner and was extremely argumentative. Further, he proceeded to inflame the jury during cross-examination of petitioner during defendants case by asking such questions as "Would you say your reputation among the people you deal with for being honest is a good one?". (Tr. 193) The objection was sustained but no admonishment to the jury was made.

Prosecutor also allowed and brought forth the witness Jerry Conger, who is in a wheelchair, to testify as the sole rebuttal witness. He was offered as a witness as to the reputation of petitioner in the community. During the conference in chambers regarding Conger's testimony, Conger was left in the court

room with the jury and petitioner. Although prosecutor was warned to limit the testimony to general reputation by Judge Mihm, (Tr. 228) the prosecutor still had the witness testify only as to his specific opinion of petitioner.

The defense counsel during trial informed the jury that he was appointed counsel. (Tr. 17) He did not require the prosecutor to establish a proper foundation for business records presented as evidence. (Tr. 44-47) He allowed a flagrantly hearsay statement go by without objection which stated that liens had been filed. (Tr. 54) He did not object to the testimony of Jerry Conger again once it became obvious that the testimony was merely a personal opinion of petitioner specifically even though he was given a clue by Judge Mihm when he stated, "I think the potential exists for a mistrial". (Tr. 227) There never was a

Motion for Mistrial.

The jury trial lasted two days. The jury deliberated approximately two hours. (App.)

EVIDENCE OF JURISDICTION BELOW

Petitioner was charged and convicted in the District Court for the Central District of Illinois of ten (10) counts of making false statements to a federally insured lending institution under federal law pursuant to 18 U.S.C. 1014. Federal jurisdiction was exclusive under this statute.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

No. _____

JOHN R. GLASSEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

To the Honorable Chief Justice and
Associate Justices of the Supreme
Court of the United States

John R. Glassey, the petitioner
herein, prays that a Writ of Certiorari
issue to review the judgment and order
entered by the United States Court of
Appeals for the Seventh Circuit on August
23, 1983, rehearing denied October 14,
1983, affirming petitioner's conviction
in the United States District Court for

the Central District of Illinois, Peoria
Division.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS HAS DENIED THE PETITIONER HIS CONSTITUTIONAL RIGHT TO A FAIR AND UNPREJUDICIAL TRIAL IN LIGHT OF THE MANY GROSS AND CRITICAL ERRORS EVIDENCED AT TRIAL.

A person accused of any crime is entitled to a fair trial, by jury if he chooses. This basic principle is safeguarded by the Constitution of the United States of America, specifically in part by the Fifth and Sixth Amendments. The petitioner herein did not receive this elementary right. Rather, because of improper evidentiary matters, prosecutorial misconduct, and incompetence of court-appointed counsel, petitioner was wrongfully convicted of making false statements to a lending institution for the purpose of .

influencing them to make a loan.

The worst of the evidentiary matters depriving defendant of his right to a fair trial was the flagrant and inflammatory testimony of Jerry Conger who was confined to a wheelchair and testified as to his personal opinion of Mr. Glassey. (Mr. Conger had no other connection with the case.) If evidence is overly prejudicial, it should not be allowed to appear before a jury.

People v. DeFrates, 395 Ill.2d 439, 70 N.E.2d 591. Lyda v. United States, 321 F.2d 788 (9th Cir., 1963) A defendant's guilt must be established by legal and competent evidence, uninfluenced by bias or prejudice raised by irrelevant evidence. People v. Crocker, 25 Ill.2d 52 (1962)

Conger was wheeled into the court room and after stating his name, address and employment, gave only the following

testimony, none of which was objected to.

Q Now, do you know the
Defendant in this case, John
Glassey?

A Yes, I do.

Q How long have you known him?

A I believe it was July, 1980.

Q Have you had any business
dealings with him and with
Colossus, Incorporated?

A Yes, I have.

Q When were these business
dealings?

A They began, I believe, in
September, 1980.

Q And continued until when?

A Until July, 1981.

Q Based upon these business
dealings do you have an
opinion as to his character
for truth or untruthfulness?

A Yes, I do.

Q Would you tell us what that is?

A I found Mr. Glassey to be very untruthful on many occasions.

Conger was the sole rebuttal witness for the Government and the last one of the trial and the last one mentioned by the prosecution in the closing rebuttal argument. Mr. Glassey's character had never truly been brought into issue and even if it could have been, the issue should have been one of general reputation in the community and not specific. The witness testified that he found Mr. Glassey to be untruthful on the basis of business dealings with him not that his reputation in the general community was that of an untruthful person. Mr. Parker, Defendant's appointed attorney, did not object to these questions although he had raised an

objection earlier with Judge Mihm. The judge had warned the prosecutor that Conger's testimony must be a general statement of reputation in the community "since they were close to a mistrial". (Tr. 227) Nevertheless, the exact type of testimony that was feared by both Judge Mihm and Mr. Parker was entered into evidence, yet nothing was done. The sole implication to the jury then was that the Defendant lies to paraplegics. The only thing that could have been more inflammatory would be if it had been a widow in the wheelchair instead of Mr. Conger.

A judge has a duty to step in if he recognizes that a gross error has been made. McCormick's Hornbook on Evidence, 2nd Ed., p. 129 (n.1)(1972). In this instance, the error was made and even foreseen by the trial judge but nothing was said from the bench.

Another matter herein which requires a remand for a new trial is misconduct of the prosecutor. The Supreme Court has recognized that a prosecutor

...is the representative not of an ordinary party to a controversy, but a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. Berger v. United States, 295 U.S. 78, 88, 79 L.Ed. 1314, 55 S.Ct. 629.

The responsibility also requires him to be sensitive to the due process rights of a defendant to a fair trial. A Fiortiori, the trial judge has the same dual obligation. Gannett Co Inc., v. DePasquale, 443 U.S. 368, 384 N. 12, 61 L.Ed. 2d 608, 99 S. Ct. 2898, N. 12 (1979)

The purpose of an opening statement is not to poison a jury's mind against defendant or to recite items of highly questionable evidence; it should be limited to a general statement of facts

intended or expected to be reproved and should generally outline or foreshadow evidence rather than to minutely describe it in detail. Further, the proper focus is on the possibility of prejudice to defendant. United States v. DeRosa, 548 F.2d 464 (3rd Cir., 1977).

When specific guarantees of the Bill of Rights are involved, the United States Supreme Court takes special care to assure that prosecutorial conduct in no way impermissibly infringes them.

Donnelly v. DeChristoforo, 416 U.S. 637, 40 L.Ed.2d 431, 94 S.Ct. 1868 (1974).

It is as much the duty of a prosecuting attorney to refrain from improper methods calculated to bring about a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger v. United States, 295 U.S. 78, 79 L.Ed. 1314 (1934). Even if based on evidence, statements by counsel

of their personal convictions of the merits of their client's cause should always be avoided. United States v. Bensen, 487 F.2d 978 (3rd Cir., 1973). If it is probable that a prosecutor's argument has engendered prejudice, defendant must be afforded a new trial. United States v. Callanan, 450 F.2d 145 (4th Cir., 1971).

In the case United States of America v. Socony-Vacuum Oil Company, 310 U.S. 150, 84 L.Ed 1129 (1939), the court noted that while an assertion by counsel in his argument to the jury of personal knowledge of certain facts in contradiction to the testimony of an opposing witness is not prejudicial error, where under the issues in the case, the testimony is wholly irrelevant and upon objection by opposing counsel the remark is withdrawn, and the jury instructed to disregard it. Socony

Vacuum Oil Company, at 239-243. The obvious implication is that if the testimony is relevant, and as discussed below, counsel for the defendant was not competent enough to object and thereby erase the harm, there can be prejudicial error. In the opening statement the prosecutor testified to the jury about his personal belief of the petitioner's guilt rather than merely outlining what his evidence would show. At that point a jury is extremely vulnerable to suggestion and the fact that the U.S Attorney is telling them that he knows this to be true is extremely effective, though highly improper. Once made, this type of testimony is not forgotten by juries even though they may be admonished by the court, which they were not. This was also not what could be considered a long trial. Rather it was merely two days, very little time and easily within

the realm of memory of a jury.

The prosecutor was guilty of further misconduct in his question of Mr. Glassey as to his reputation in the community. His question of petitioner, "Would you say your reputation among the people you deal with for being honest is a good one?" was made for the sole purpose of inflaming the jury. Defense counsel's objection was sustained. However, there should have been an admonishment to the jury. More blatant disregard of proper procedure was shown by the inclusion of Mr. Conger as a witness. The prosecutor had been warned by the judge and yet he still had the witness testify as to his specific belief or opinion of Mr. Glassey, rather than the general reputation petitioner held in the community.

Another reason why this Petition for Writ of Certiorari should be granted and

a new trial granted is the fact that there was gross negligence on the part of defendant's counsel. One of the elements to a fair due process trial authorized by the Fifth Amendment to the Constitution is the fact that the Sixth Amendment gives the defendant the right to counsel and that, if he cannot afford one, that one should be appointed for him. The principle behind having an attorney appointed is so that a knowledgeable guide is provided to take the defendant through the procedural nightmares of our system and to provide the educated ability to cross-examine the accusers and witnesses against defendant. See: Carnley v. Cochran, 369 U.S. 506, 8 L.Ed 2d 70, 82 S Ct. 884 (1962). If these principles are indeed the backdrop to the reason for the Sixth Amendment, then when the court-appointed counsel does not provide the proper guidance through the

procedures, then the defendant is in much the same condition he was before counsel was appointed. An indigent should be given not only the right to counsel but also the right to competent counsel. It is an inherent rule in the American legal justice system that the courts should not and cannot hold an indigent defendant responsible for the errors of an attorney. U.S. v. Powe, 591 F.2d 833 appeal after remand 627 F.2d 1251. If an accused shows a substantial violation of duties owed to him by counsel, accused has been denied effective representation of counsel. United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973). Further, a remark to the effect that he had been appointed by the court is not good practice. United States v. Naylor, 566 F.2d 942 (5th Cir., 1978) It is not one particular mistake that causes this allegation but rather the number of them

taken as a whole which requires a great deal of attention. His initial opening statement informing the jury that he was appointed to be Mr. Glassey's attorney makes it sound as if that is the only way he would have involved himself with petitioner rather than giving a confident statement as to evidence of innocence. Further, negligence allowed exhibits of business records without a proper foundation when he did not strongly object to the loan process cards being entered into evidence during Mr. Gauwitz' testimony in the prosecution's case. During the same testimony there was a flagrant hearsay statement by the witness stating that, "That's when we started finding all these liens being filed".

The most flagrant failure was in the already discussed testimony of Jerry Conger, the wheelchair victim. Mr. Parker did not object to the testimony

once it was being presented to the jury. There was never any motion for mistrial which was an obvious remedy as a result of the use and admission of the testimony of Mr. Conger. He never even mentioned it in his appeal brief to the United States Court of Appeals for the Seventh Circuit.

The crux of the above arguments is that, taken individually they might not require a writ for certiorari and the new trial; however, when analyzed together there is a clear mandate for the Writ to be granted.

The court below stated that the jury could have believed that petitioner meant to influence the lender. The testimony of the wheelchair victim and his presence in the court room for an extended period of time though, could have been, and probably was, a factor as to their bias against petitioner. They may not have

formed the belief if it were not the result of a compilation of the errors made with the Conger testimony, the prosecutorial mistakes and misconduct, and the blatant lack of intervention for his clients basic welfare by the court-appointed attorney. Even if the law was totally one-sided, which it was not proved to be, a defendant is entitled to a fair trial and in this instance Mr. Glassey was not given one.

II

THE REFUSAL BY THE SEVENTH CIRCUIT COURT OF APPEALS TO REVERSE OR REMAND FOR A NEW SENTENCING HEARING IS IN CONTRAVENTION WITH FAIRNESS AND LAW AS TO TURNING A SINGLE TRANSACTION INTO MULTIPLE OFFENSES.

The sentencing was totally inconsistent and bore no relation to the offense nor to defendant's total lack of prior record.

The sentence in this case was far too harsh. It is the presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of harsher punishment. When Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses. Bell v. United States of America, 349 U.S. 81, 99 L.Ed 905, 75 S.Ct. 620 (1954). When the trial court is deciding what sentence should be imposed, the Court should just impose sentence for the singular criminal acts and not the effects. O'Brien v. United States, 376 F.2d 538. In the sentencing hearing a court should only consider positively evidenced behavior and not behavior of which there is a lack of conclusive proof. United States v. Buckley, 379 F.2d 424 cert.den. 389 U.S. 929, 88 S.Ct.

289, 19 L.Ed 2d 280 (7th Cir., 1967)

The trial court did not take into account a number of things. The activity which caused the supposedly illegal act was the signing of the lien papers which allegedly was for the purpose of influencing the lending institution. Even assuming there was a fair trial on that issue, it was just that one issue. One set of facts. One transaction. Regardless of the number of papers he signed, the law does not require multiple sentence for one continuous course of action. United States v. Reed, 647 F.2d 678 (6th Cir., 1981). This is particularly true when a criminal statute is violated in a single criminal episode indicating that multiple punishments can not be imposed for two offenses arising out of the same criminal transaction unless each offense "requires proof of a fact which the other does not". Whalen

v. United States, 445 U.S. 604, 63 L.Ed 2d 715, 100 S.Ct. 1432 (1980) See: Ladner v. United States, 358 U.S. 169, 3 L.Ed 2d 199, 79 S.Ct. 209 (1958). The Eleventh Circuit Court of Appeals recently dealt with a similar area of multiplicity as is present in this case. Although the court in United States v. Glanton, 707 F.2d 1238 (11th Cir., 1983), found that when the defendant falsely presented himself and signed a signature card, falsely endorsed a check, and nine days later signed a check using anothers name, he was not subject to an allowance that all charges stemmed from the same trans-action.

Even assuming that the court in Glanton is completely correct, this case is sufficiently and obviously different. Here there was not anything more than one mere action of signing his name to papers at one sitting, on one day. The Glanton

case, therefore, is easily distinguished and makes this case obviously in line with those cited above.

Further, there was a complete lack of intent on the part of Mr. Glassey. The defendant had no knowledge that the bank's representative was coming to see him. He had no time to develop any intent to defraud the bank. When Mr. Nalley, the bank officer, arrived, he told him, "I needed to have these signed to complete our files". (Tr. 101) He may have signed them with absolutely no criminal intent whatsoever and at worst he signed them with a minimum time to reflect. Also the evidence showed that the prior intent was to the contrary; namely that the petitioner tried to get loans to clear up the debts. Thus, the evidence showed no true premeditation.

Further, there is some element of compulsion existing here. As already

noted, the affidavits were signed as a result of Mr. Nalley's statement that they were needed to complete the files. The point that should be noticed is that the parties were no longer acting as equals. The bank had power over petitioner by virtue of their position and further by saying it was "to complete files". It tended to lead defendant to believe either the bank knew or condoned the signing when some amount was still not paid.

The legal effect of this is not to excuse Mr. Glassey from signing the documents but rather to illustrate the state of mind and lack of intent which existed when the "crime" was committed. It was such that would normally demand a minimal punishment, certainly not consecutive sentences. The sole alleged criminal act by petitioner was the signing of forms on one occasion at one

place and at one time. There was not enough difference for disparate sentences.

The purpose of the law allegedly violated is to protect banks and savings and loans from losing money. Surprisingly though, on the first two Counts there was no money lost and yet the petitioner received two years on the first Count and two years consecutively on the second Count. No money was paid at all to clear liens on five out of ten of the loans for a net loss of \$6,177.85. Four years in prison is far too harsh a sentence for that small of an amount lost by non-violent means.

There was also extensive testimony about money spent on two houses to "finish home construction" shown on Exhibit 11. It was highly prejudicial as to the sentencing, particularly since the amount was double the amount of money

paid to clear the liens. There was no testimony at all as to what those moneys were spent on. It could simply have had nothing to do with the criminal intent and yet was allowed in. In any event, it should not have been in a criminal trial. Rather, it should have been the subject of a civil suit. There was no connection between the sole alleged criminal act of signing the lien waivers and the extra work.

As was noted in the first section of this Petition, there was a presence of gross negligence on the part of defendant's trial attorney. A defendant is as much entitled to effective representation by counsel at sentencing as at any other stage of his trial.

United States v. Pinkney, 543 F.2d 908
(D.C. Ct. of App., 1976).

Mr. Glassey's record as evidenced by the sentencing hearing was clear, showing

a perfect case for leniency and a complete lack of multiple offenses on which basis to instigate consecutive sentences. The court still, however, handed down two consecutive two year sentences - far too harsh a penalty.

Therefore petitioner requests that a reduction be made on the sentence, or in the alternative, the case be remanded to the trial judge with instructions for a new sentencing hearing.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully Submitted,

CHARLES R. THOMAS, P.C.
Counsel for Petitioner
417 Court Street
Pekin, IL 61554

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

No. _____

JOHN R. GLASSEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

APPENDIX - GENERAL FORM

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-2998

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN R. GLASSEY,

Defendant-Appellant.

Appeal from the United States District Court for the
Central District of Illinois, Peoria Division.
Civil No. 82 CR 10008—Michael M. Mihm, Judge.

ARGUED MAY 12, 1983—DECIDED AUGUST 23, 1983

Before POSNER and COFFEY, *Circuit Judges*, and GIBSON,
Senior Circuit Judge.*

PER CURIAM. John Glassey appeals his conviction and sentence for making false statements to a federally insured savings and loan in violation of 18 U.S.C. § 1014 (1976). We affirm the judgment of the district court.

* The Honorable Floyd R. Gibson, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

1.

Glassey was part owner of a construction company, Colossus, Inc. He periodically obtained interim construction loans for the corporation from Peoples Savings and Loan Association of Chillicothe (Peoples). These were loans for sixty to ninety days to finance the construction of houses until they were sold. Peoples would set up an account with the money it loaned Colossus. Peoples would take its interest payments out of the account and pay subcontractors when Colossus submitted the bills. Sometimes Colossus would pay subcontractors itself and Peoples would reimburse Colossus.

On May 20, 1981, all the proceeds from the ten loans at issue had been disbursed. A bank representative asked Glassey to sign lien waivers and affidavits verifying that all the subcontractors had been paid in full. Glassey signed such forms for the ten accounts knowing that some subcontractors had not been paid in full. Glassey was indicted on ten counts for these false affidavits. He was convicted after a jury trial on all ten counts. On eight of the counts he received two-year concurrent sentences. He received a consecutive two-year sentence on another count, and a three-year suspended sentence on the tenth count.

11.

Section 1014 of Title 18 of the United States Code makes it a crime to "knowingly make[] any false statement or report . . . for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation. . . ." (Emphasis added.) Actual reliance by the savings and loan on a defendant's false statements is not necessary for a conviction under § 1014. It is enough that the statement has the capacity of influencing the savings and loan. *United States v. Braverman*, 522 F.2d 218, 223 (7th Cir.), cert. denied, 423 U.S. 985 (1975).

Glassey argues that there was insufficient evidence that he made the statements for the purpose of influencing Peoples because Peoples was incapable of being influenced

by the affidavits. Glassey points to the fact that he had already received the loan proceeds when he signed the affidavits. If he had been truthful there was nothing the institution could have done differently. He was not attempting to apply for a loan at the time he signed the affidavits. He testified that he lied only because he thought the affidavits were a mere formality necessary for Peoples to close its files.

We find that the evidence was sufficient to allow the jury to conclude that Glassey made the statements with the intention to influence Peoples and that Peoples had the capacity to be influenced. An executive vice president of Peoples testified that it may have tried to work out another loan with Glassey so that the unpaid subcontractors could get their money. Also, the jury could have reasonably believed that Glassey lied so that he could get future interim construction loans or get those loans on more favorable terms than he could receive if Peoples knew the truth. The inference would be particularly warranted because Glassey had been getting loans on a regular basis from Peoples for several years. The fact that Glassey was not applying for a loan at the particular time he signed the affidavits does not make the inference unreasonable. There was sufficient evidence to sustain the conviction.

III.

Glassey also argues that his sentence calling for four years incarceration is excessive in light of the fact that he had no prior criminal record and found himself in financial straits only because of a severe slump in the home construction business.

Our standard of review here is extremely limited. "A reviewing court may not change or reduce a sentence imposed within the applicable statutory limits on the ground that the sentence is too severe unless the trial court relied on improper or unreliable information in exercising its discretion or failed to exercise any discretion at all in imposing the sentence." *United States v. Main*, 598 F.2d 1086, 1094 (7th Cir.), cert. denied, 444 U.S. 943. See also *United States*

v. Brubaker, 663 F.2d 764, 768 (7th Cir. 1981); *United States v. Dawson*, 642 F.2d 1060, 1062 (7th Cir. 1981). Section 1014 allows a maximum penalty of two years imprisonment and a \$5,000 fine. The district court had the benefit of observing Glassey at trial and considered the pre-sentence report and letters received from friends and business associates of Glassey before sentencing. Therefore, we cannot say on this record that the trial court either relied upon improper information or failed to exercise any discretion.

The judgment of the district court is affirmed.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

October 14, 1983

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. FLOYD R. GIBSON, Senior Circuit
Judge*

UNITED STATES OF AMERICA	)	Appeal from
Plaintiff-Appellee,	)	the United
	)	States
	)	District Court
	)	for the
	)	Central
	)	District of
No. 82-2998	vs.	) Illinois,
		) Peoria
		) Division.
)
JOHN R. GLASSEY,	)	No. 82 CR
Defendant-Appellant.)	)	10008
	)	Michael M.
	)	Mihm, <u>Judge</u> .

ORDER

On September 16, 1983, defendant-

appellant John R. Glassey filed a petition for rehearing with suggestion for rehearing en banc. All of the judges of the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

* Hon. Floyd R. Gibson, of the Eighth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

October 26, 1983

Before

Hon. RICHARD A. POSNER, Circuit Judge

UNITED STATES OF AMERICA,	)	Appeal from
Plaintiff-Appellee	)	the United
	)	States
	)	District Court
	)	for the
	)	Central
	)	District of
No. 82-2998	vs.	) Illinois,
		) Peoria
		) Division.
)
JOHN R. GLASSEY,	)	No. 82 CR
Defendant-Appellant	)	10008
	)	Judge Michael
	)	M. Mihm

The "MOTION FOR STAY OF MANDATE PENDING PETITION FOR CERTIORARI" filed herein on October 21, 1983, by counsel for the defendant-appellant is GRANTED. The mandate of this court which was improperly issued on October 25, 1983, is RECALLED. The clerk of the district court is directed to retain the record pending further order of this court.

IT IS FURTHER ORDERED that the
mandate of this court is STAYED to and
including November 25, 1983.

APPENDIX C

UNITED STATES DISTRICT COURT for
CENTRAL DISTRICT OF ILLINOIS

United States of America vs.

JOHN R. GLASSEY Docket No. 82-10008

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date - December 3, 1982

WITH COUNSEL Drew L. Parker

with a PLEA of NOT GUILTY

There being a verdict of GUILTY, on
October 13, 1982.

Defendant has been convicted as charged of the offense(s) of False Statements Made to Influence Loan, Title 18, U.S. Code, Section 1014.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years each on Counts 1 and 2 of the

Indictment herein to run consecutively under the provisions of Title 18, U.S. Code, Section 4205(a).

IT IS FURTHER ORDERED that Defendant is hereby committed to the custody of the Attorney General for imprisonment for a period of two (2) years each on Counts 3 through 9 of the Indictment herein to run concurrently with the sentence imposed on Counts 1 and 2 herein.

IT IS FURTHER ORDERED that imposition of any other sentence is suspended and Defendant is placed on probation for a term of three (3) years on Count 10 of the Indictment herein, to commence upon termination of any parole on the sentence to custody on Counts 1 through 9.

No Order on Costs

IT IS ORDERED by the Court that Defendant shall comply with the general and special conditions of probation as set out in Form #7, furnished by the Probation Officer and to the special terms outlined in the plan of the Probation Department.

IT IS FURTHER ORDERED that Defendant's Motion For Stay Pending Appeal is granted and the existing bond shall remain in full force and effect pending appeal.

The court orders commitment to the custody of the Attorney General.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by
XX U.S. District Judge

MICHAEL M. MIHM

Dated December 3, 1983

APPENDIX D

Title 18 Section 1014 provides:

Loan and credit applications generally;
renewals and discounts; crop insurance

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131 to 1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the

Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, re-purchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than \$5,000 or imprisoned not more than two years, or both.

As amended Oct. 12, 1982, Pub.L. 97-297,
§ 4(b), 96 Stat. 1318.